

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

77-4006-7

United States Court of Appeals
FOR THE SECOND CIRCUIT

JOSEPH P. D'ANGELO and
DAYCON INVESTORS ASSOCIATES, INC.,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION
RESPONDENT

BRIEF FOR PETITIONERS

JOSEPH P. D'ANGELO
PETITIONER PRO SE
810 Abbott Road
Buffalo, New York 14220

B
P/S

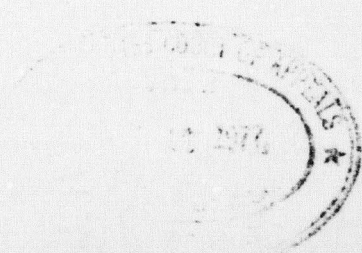


TABLE OF CONTENTS

	<u>Page No.</u>
Table of Cases.....	ii
Table of Statutory Citations.....	iii
Statement of Issues for Review.....	1
Preliminary Statement.....	2
Statement of the Case.....	4
Statement of the Facts:	
A. Facts concerning the 1970 Final Judgement of Permanent Injunction.....	6
B. Facts concerning Daycon's August 23, 1976, Application for Registration as an Investment Advisor.....	10
ARGUMENT:	
Point I: Daycon's failure to properly prepare the August 23, 1976 application for registration as an Investment Advisor is not sufficient grounds for denial of Daycon's registration as an Investment Advisor and permanent exclusion of D'Angelo from associating with an Investment Advisor.....	12
Summary of Point I.....	16
Point II: D'Angelo's consent to the entry of the September 29, 1970 final judgement of permanent injunction does not justify the exclusion of D'Angelo from associating with an Investment Advisor.....	17
Summary of Point II.....	21
Point III: The order of the Securities and Exchange Commission must be set aside because the penalty is more severe than that permitted by statute.....	22
Conclusion.....	24

TABLE OF CASES

	<u>Page No.</u>
<u>In the Matter of Balbrook Securities Corporation,</u> 42 SEC 496 (1965).....	17
<u>Cummings v. Missouri</u> 71 US (4 Wall) 277, 320-322 (1866).....	23
<u>Exparte Garland</u> 71 US (4 Wall) 333, 380-381 (1866).....	23
<u>Securities and Exchange Commission</u> <u>-against- Tycodyne Industries Corporation,</u> <u>Joseph P. D'Angelo and Raymond Dean,</u> Civil 1970-421 U.S. Dist. Ct. for the W. Dist. of N.Y. (1970).....	6
<u>United States v. Lovett</u> 328 US 303, 314 (1946).....	23

TABLE OF STATUTES

Statute and Section

Page No. •

Investment Advisors Act of 1940

Section 203(c)(1)

10

Section 203(c)(2)

2, 10

Section 203(e)

4

Section 203(f)

2, 4, 22

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH P. D'ANGELO and
DAYCON INVESTORS ASSOCIATES, INC.,

Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent

DOCKET NO. 77-4006-7

BRIEF FOR PETITIONERS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Daycon's failure to properly prepare the August 23, 1976, Application for Registration as an Investment Advisor is a sufficient basis for denial of its registration as an Investment Advisor and for the exclusion of Dr. D'Angelo for life from ever associating with an Investment Advisor.
2. Whether Dr. D'Angelo's consent to the entry of the September 29, 1970, Final Judgement of Permanent Injunction justifies his exclusion from associating with an Investment Advisor.
3. The Order of the Securities and Exchange Commission must be set aside because the penalty is more severe than that permitted by statute.

PRELIMINARY STATEMENT

This is a petition for review of orders of the Respondent, Securities and Exchange Commission ("SEC") which have denied the registration of Petitioner, Daycon Investors Associates, Inc., ("Daycon") as an Investment Advisor under the Investment Advisors Act of 1940 ("Advisors Act") and barred Petitioner, Joseph P. D'Angelo ("D'Angelo") for life from ever being associated with any Investment Advisor.

Daycon's application for registration as an Investment Advisor-Form ADV (Respondent's Exhibit No. 4, hereinafter RX "__") was accepted for filing with the SEC as of August 23, 1976. Subsequent to this filing the SEC instituted public proceedings pursuant to Sections 203(c)(2) and 203(f) of the Advisors Act. A hearing was held in Buffalo, New York on October 20, 1976, before the Honorable Jerome K. Soffer, Administrative Law Judge ("Soffer") who, after receiving the SEC and D'Angelo briefs, ordered:

1. That the registration of Daycon as an Investment Advisor under the Advisors Act be, and hereby is denied.

2. That D'Angelo be and hereby is suspended from becoming associated with an Investment Advisor for a period of six months following the effective date of this Order. (Initial Decision, A.P. 3-5098, at p. 221 of the Joint Appendix to this Brief, hereinafter at "A__").

On November 11, 1976, the SEC filed a Petition for Review (A223) which was followed by the Petitioners' Reply Brief (A232). The SEC demanded that D'Angelo be barred from association with an Investment Advisor. This request was granted by the Commissioners of the SEC, Loomis, Evans, and Pollack, on December 16, 1976. (Commission's Memorandum Opinion and Order File No. 3-5098 (A238)].

STATEMENT OF THE CASE

This case involves the SEC denial of Daycon's August 23, 1976, Application for Registration as an Investment Advisor under the Advisors Act of 1940, and the exclusion of Daycon's President, Joseph P. D'Angelo, from associating with an Investment Advisor. The SEC based its denial of Daycon's application on the grounds that it violated Section 203(e) of the Advisors Act in that Daycon allegedly failed to disclose in Item 16(c) of its application, that D'Angelo has been permanently enjoined by a 1970 Court Order (A217). This alleged failure to disclose and the mere existence of the 1970 Consent Injunction are the grounds upon which the SEC forever bars D'Angelo from being associated with an Investment Advisor pursuant to Section 203(f) of the Advisors Act (A240).

D'Angelo, representing Daycon and himself, pro se, argues that the denial of Daycon's Application is unjustified because Daycon's mismarking of Item 16(c) is a mere typographical error and as such it can not be the basis on which to deny its application. D'Angelo further argues that the information supplied in the attached Schedule E to the August 23, 1976, application adequately advises a reader that he had consented to a Court Injunction Order. Moreover, any deficiencies in the information supplied in Schedule E are the fault of the SEC failure to advise D'Angelo of the specific information required. The preparation of Schedule E, by itself, alerts the reader that the applicant-writer is explaining in reference to the court action admitted to in Item 16(c).

Aside from the disclosure issue, D'Angelo contends that the mere existence of the 1970 Consent Injunction cannot be the basis on which to bar him from engaging in the Investment Advisor's field. The circumstances surrounding the 1970 Consent Injunction prove that it is irrelevant to the qualifications and trustworthiness of D'Angelo and Daycon, and therefore, cannot be a valid reason to bar D'Angelo from associating with an Investment Advisor and certainly not grounds for denial of Daycon's Registration as an Investment Advisor.

STATEMENT OF THE FACTS

Facts concerning the 1970 Final Judgement
of Permanent Injunction

The basis of the SEC denial of Daycon's application for registration as an Investment Advisor is the mere existence of D'Angelo's consent to the Final Judgement of Permanent Injunction rendered in the case of Securities and Exchange Commission against Tycodyne Industries Corporation, Joseph P. D'Angelo and Raymond Dean, Civil 1970-421, U.S. Dist. Ct. for the W. Dist. of N.Y. (1970) (RX3), the following are the facts concerning this judgement.

D'Angelo was the President of Tycodyne Industries Corporation ("Tycodyne") from 1966 to 1970. In 1968, Tycodyne decided to have a public offering pursuant to an exemption from registration with the SEC (A178). Tycodyne's attorney at the time, Richard Johnson, a professed SEC specialist, prepared the Offering Circular dated February 15, 1968 (A178). The financial statement for the Offering Circular was prepared by Tycodyne's Controller, Donald T. Lusby (A178).

Shortly after the Offering was made to the public, D'Angelo discovered that several representations made therein were not factual so he withdrew the Offering. In withdrawing the Offering, he also notified all stockholders who purchased stock with reference to this Offering Circular as to his findings and offered their money back if they desired (A178).

Several months later, the New York Office of the SEC notified Tycodyne of their decision to investigate the sale of stock by the use of the herein referred to Offering Circular. D'Angelo offered his full cooperation during the investigation; and after discovering the problems generated by the ill-advisement of Tycodyne's attorney, Mr. Richard Johnson, severed all associations between Mr. Johnson and Tycodyne (A179). In the mean time the Company hired a New York lawyer, Mr. William Ruffa, and a New York accounting firm to assist Tycodyne in correcting the problems which were brought to the attention of D'Angelo by the SEC (A179).

During the entire investigation, D'Angelo's contact with the SEC was through a Mr. Ralph Kessler of the Commission. Mr. Kessler assured D'Angelo that he personally was not involved in any wrong doing, but that Tycodyne's problems stemmed solely from the poor legal and accounting advice it had received (A135).

However, on September 14, 1970, the SEC filed a Summons and Complaint in the United States District Court for the Western District of New York against Tycodyne, D'Angelo and another Tycodyne Officer. The Complaint sought to enjoin the Defendants from violating certain sections of the Securities Laws. Immediately after the Complaint was filed, the Buffalo area news media, including newspapers, radio and television, began making wild accusations that D'Angelo had committed fraud and that there was Mafia involvement.

At this time, D'Angelo was completely unaware of what was happening because he had been in Florida for his mandatory annual health stay since

August 15, 1970¹. (A73). He first became aware of the charges when his family, business associates, patients, and friends contacted him in Florida after the media stories broke (A70). He thereupon made several phone calls to Mr. Ruffa and Mr. Kessler. They both assured him that he was not personally charged with any wrong doing and that his involvement was only as President of Tycodyne (A74, 75). They pointed out that the whole matter could come to a quick conclusion if he would fly up to New York City and sign a "consent action" (A79). They further stated that this "consent action" would bear no reflection on him personally. Messrs. Ruffa and Kessler assured D'Angelo that it was a mere procedural device which would expedite the end of the whole affair (A74).

Hence, on September 18, 1970, while under heavy sedation and unable to see well, D'Angelo made a round trip between Florida and the SEC New York Offices spending no more than twenty minutes at the latter place where he signed the consents (A212). D'Angelo did not read the documents he signed that day (A41).

Some time later, after reading the charges in the SEC Complaint for the first time and knowing he was innocent of them, D'Angelo requested that Mr. Ruffa bring proceedings to set aside the Court's

¹For the past twenty-nine years, D'Angelo has suffered from an allergic form of asthma, which necessitates that he leave his Buffalo domicile about August 15th of each year and sojourn the pollen free areas of Florida until the Buffalo area has its first frost (A73, 74, 75).

Injunction against him. However, he withdrew this request upon Mr. Ruffa's advice that this procedure would be expensive, would only stir-up more notoriety, and that in any event, he was only being enjoined from future violations of law which he intended to obey anyways (A212, 213). D'Angelo then sent letters to Tycodyne's stockholders professing his innocence of the charges made by the SEC and forthwith resigned from the Company.

FACTS CONCERNING DAYCON'S AUGUST 23, 1976
APPLICATION FOR REGISTRATION AS AN INVESTMENT ADVISOR

In May of 1976, D'Angelo, as President of Daycon Investors Associates, Inc., intended to have Daycon register as an Investment Advisor pursuant to Section 203(c)(1) of the Advisors Act. Upon reading the SEC Application for Registration as an Investment Advisor - Form ADV, D'Angelo noticed that Item 16(c) on the application asks whether the applicant or anyone associated with him is permanently...enjoined by order, judgement or decree of any court...(RX1). The answer to Item 16(c) is indicated by a simple check mark in either "yes" or "no" box at the end of Item 16(c), D'Angelo checked the "no" box because he felt Item 16(c) did not apply to him (A44).

Daycon then filed its application for registration on May 8, 1976. It was accepted by the SEC on June 16, 1976 (RX1). Five days before the forty-five day limit for agency action, Section 203(c)(2) of the Advisors Act, Mr. Lawrence Toscano of the SEC Division of Enforcement informed D'Angelo that Item 16(c) on Daycon's application was improperly marked (A44, 45, 46). D'Angelo disagreed and requested a formal hearing on this matter, but was told that there was not enough time for this on his present application (A44). It was agreed that D'Angelo would withdraw Daycon's application and submit a new one (A44). He was instructed to answer Item 16(c) in the affirmative and to elaborate on this answer in Schedule E attached to the new application (A46). He was instructed by Mr. Toscano and Mr. Kenneth I. Daniels to send a letter to Mr. Bobby

Shaw, Chief of Branch of Broker/Dealer and Investment Advisor Registrations SEC explaining his understanding and feelings on the 1970 Consent injunction and to request a hearing on the matter, Petitioners Exhibit C (Herein after PXc). Daycon then formally withdrew its first application and filed its second application dated August 23, 1976 (RX4).

D'Angelo dictated instructions for the preparation of the August 23, 1976, application to his secretary. Unfortunately, his secretary in typing up the application mistakenly marked the "no" box again for Item 16(c) (A47). D'Angelo failed to notice this mistake (A47). However, as requested, he explained his interpretation of the consent injunction in Schedule E attached to the application (RX4). It must be noted that there is no need to fill out Schedule E if Item 16(c) is marked "no". Further elaboration in Schedule E is necessary only if Item 16(c) is answered in the affirmative (RX4). In other words, D'Angelo filled in Schedule E because he took it for granted that Item 16(c) was marked "yes".

ARGUMENT

Point I

DAYCON'S FAILURE TO PROPERLY PREPARE THE
AUGUST 23, 1976 APPLICATION FOR REGISTRATION
AS AN INVESTMENT ADVISOR IS NOT SUFFICIENT
GROUNDS FOR DENIAL OF DAYCON'S REGISTRATION
AS AN INVESTMENT ADVISOR AND PERMANENT EX-
CLUSION OF D'ANGELO FROM ASSOCIATING WITH
AN INVESTMENT ADVISOR.

The SEC finds that Daycon's Application for Registration-Form ADV dated August 23, 1976, fails to alert a reader of the 1970 consent injunction. The SEC bases this finding on the improperly marked answer box to Item 16(c) on application and the inadequacy of information supplied in the attached Schedule E. The SEC concludes that because of this alleged failure to apprise, D'Angelo's application is dishonest and therefore it must be denied.

D'Angelo explained to the SEC that Item 16(c) was incorrectly marked by his secretary. He just failed to detect the mistake. He had every intention to correctly mark Item 16(c). This intention is verified by his filing of the attached Schedule E. There is no need to file Schedule E unless the applicant cares to explain his affirmative answer to Item 16(c). In other words, D'Angelo, taking for granted that Item 16(c) was marked in the affirmative, tried in Schedule E to explicate such an answer. There is no other valid explanation to this whole matter.

However, the SEC contends that the actual negative answer to Item 16(c) on D'Angelo's application is conclusive proof that he intentionally tried to hide the 1970 consent injunction from the reader. This is ridiculous in light of the fact that D'Angelo was instructed by the SEC to affirmatively mark Item 16(c) and D'Angelo knew they would be looking for it to be so marked. This being the case, the SEC claim of intentional concealment and cover-up is an insult to D'Angelo's intelligence because it is impossible to hide something on a flat piece of paper. The point is that D'Angelo did not intend to hide anything. It is simply a matter of an overlooked mistake.

D'Angelo reminds the SEC that everyone makes mistakes and is occasionally inattentive including themselves. For example, the SEC admitted that it was "by inadvertance that their motion for extension of time to file the record was not filed prior to the deadline" (A245). The SEC excuse was that they have much work and the deadline was merely overlooked. It may be said that the SEC and D'Angelo are guilty of a similar degree of oversight. Yet, the consequences D'Angelo is subjected to are vastly disproportionate. Has the SEC been as severely sanctioned for their oversight? Have they been denied their right to reply to this Petition for Review? Have they been sanctioned for life?

The SEC is willing to deprive D'Angelo/Daycon of a form of livelihood because of a typographical error on Daycon's application and his inadvertant failure to detect it. Moreover, the SEC turns this mistake

and oversight into acts of willful falsehood and dishonesty. D'Angelo implores the Court to reject this nonsense and view his inadvertance for what it is; human error. Such a small error can not be a basis on which to deprive a man of a professional career or deprive Daycon from receiving registration as an Investment Advisor.

The SEC argues that even if they accept D'Angelo's explanation of the mismarked Item 16(c), the information furnished in Schedule E is inadequate to apprise a reader of the 1970 consent injunction. This argument is based on the grounds that the word "injunction" is not used, the name of the enjoining Court is omitted, and the allegations in the SEC Complaint are not summerized (A217). However, D'Angelo was never informed by the SEC that this specific information was required. He was merely told to mark Item 16(c) "yes" and give his explanation in Schedule E (A47, 48, 49).

Item 16(c) simply asks whether the applicant or any person associated with him is permanently or temporarily enjoined etc....(RX4). D'Angelo argues that this question and the simple "yes" or "no" answer box provided is very misleading because it omits the circumstances behind the injunction. These circumstances are essential to a true understanding of the meaning of the injunction so admitted to, the seriousness of the matters involved, how it came about, and the people actually responsible for its imposition. Therefore, D'Angelo attempted to give this information in Schedule E in order to clarify what he thought he admitted

to in Item 16(c). What appears in Schedule E is simply his version of the 1970 injunction. It is not an attempt to cover up or hide it. D'Angelo cannot be punished for taking advantage of his right to explain a situation in which he felt needed his views aired.

The SEC order denying Daycon's registration as an Investment Advisor and baring D'Angelo for life from ever associating with an Investment Advisor is based substantially on charges of the Petitioners lack of attention in preparing their Investment Advisor Registration Form. D'Angelo and Daycon have shown convincing proof that this oversight was a mere typographical error. Yet, when the SEC failed to comply with filing of the record on February 4, 1977 and, in fact, did not request an extension to file until February 16, 1977; twelve days after the February 4th day required by the Court, their only excuse was "by inadvertance" etc....(A245). The SEC is guilty of similar lack of attention as is D'Angelo and Daycon. Yet, the SEC suffers no penalty and can be purged of its wrong doing by a mere motion for extension. Certainly such disparate treatment is contrary to basic notions of fairness. Does the law have double standards - one for the Government and the other for the people?

SUMMARY OF POINT I

The SEC denies Daycon's Application and bars D'Angelo for life because Item 16(c) is improperly marked and alleges that the information in Schedule E is inadequate. The incorrect answer to Item 16(c) is a mere typographical error and the preparation of Schedule E verifies it as such. It is not an attempt to hide anything. Such a small mistake can not block D'Angelo and Daycon from entering the Investment Advisor profession.

The deficiency in the information provided in Schedule E is due to the SEC failing to advise D'Angelo of the required information. The mere preparation of Schedule E alerts the reader that the applicant/writer is making reference to Item 16(c) Court Action. Daycon has a right to explain in Schedule E the misleading question/answer of Item 16(c). Exercising that right cannot be infringed upon merely because the SEC disagrees with that explanation.

Therefore, because of the above reasons the SEC denial of Daycon's Application and exclusion of D'Angelo for life from associating with an Investment Advisor are unjustified and not supported by sufficient grounds.

ARGUMENT

Point II

D'ANGELO'S CONSENT TO THE ENTRY OF THE SEPTEMBER 29,
1970 FINAL JUDGEMENT OF PERMANENT INJUNCTION DOES NOT
JUSTIFY THE EXCLUSION OF D'ANGELO FROM ASSOCIATING
WITH AN INVESTMENT ADVISOR.

The mere existence of the 1970 consent injunction against D'Angelo is the basis on which the SEC precludes D'Angelo from associating with an Investment Advisor. In the Matter of Balbrook Securities Corporation, 42 SEC 496 (1965), the SEC obtained an injunction against Balbrook Securities and its president. The injunction enjoined the defendants from violating various provisions of the Investment Company Act of 1940. Four years later, Balbrook's president applied for registration as a broker/dealer. The issue was whether the consent injunction furnished a statutory basis for denial of the president's application for registration. The Commission held that the consent injunction may furnish a statutory basis for denial of the application for registration if such action is in the public interest i.e. "the nature of the acts enjoined and the circumstances under which the injunction was obtained are such as to indicate that revocation [a denial] is in the public interest". See Balbrook, at p. 498. In the Balbrook case the SEC concluded that the mere existence of the injunction, alone, was not sufficient indication that denial of registration would be in the public interest.

In the present case Administrative Law Judge Soffer states in his Initial Decision that the facts and circumstances behind the 1970 consent injunction must be evaluated in terms of the seriousness of the matters involved therein, how it came about, and the role D'Angelo played. Such evaluation is necessary in order to find whether the exclusion of D'Angelo based on the injunction is in the public interest (A218). The SEC concludes that despite these factors, exclusion based on the injunction is in the public interest (A238).

D'Angelo vehemently disagrees with this conclusion and argues that his right to associate with an Investment Advisor is being illegally interfered with under the guise of protecting the public interest. The infringement of D'Angelo's right to associate with an Investment Advisor must bear a reasonable relation to the purpose of the Advisors Act. The purpose of the Advisors Act is to insure that the public deals only with qualified and trustworthy Investment Advisors. D'Angelo argues that there is no reasonable relation between his exclusion and the purpose of the Advisors Act because the denial is based on the consent injunction which has no bearing on the qualifications and trustworthiness of D'Angelo. The consent injunction is irrelevant to D'Angelo's qualifications to associate with an Investment Advisor because it does not show D'Angelo was personally guilty of any wrong doing or dishonest in any manner. Moreover, D'Angelo consented to the injunction upon ill-advisement and under great pressure and confusion caused by intense, media coverage and his serious health problems. These factors render the consent injunction

meaningless as to any relation it has to the qualifications of D'Angelo to associate with an Investment Advisor.

Since the consent injunction is irrelevant as to D'Angelo's qualifications and trustworthiness, his exclusion based upon it has no reasonable relation to the purpose of the Advisors Act. Therefore, his exclusion is unjustified.

D'Angelo argues that the SEC is using the consent injunction to create a non rebuttable presumption that the person so enjoined or anyone associated with him is not qualified to associate with an Investment Advisor. Such a presumption is not necessarily and universally true and alternative means of proof are available to show the quality or lack of quality of D'Angelo. The SEC cannot so presume rather than prove D'Angelo's fitness or unfitness because it is more convenient to do so. Administrative convenience does not dispense with a person's right to rebut that which is presumed.

The high standards required under the Investment Advisors Act guarantee that all people associated with an Investment Advisor will be worthy of the public trust. The SEC is using the consent injunction as proof that D'Angelo is not worthy of that trust. Yet, the injunction does not prove that D'Angelo is at all unqualified or dishonest. Moreover, D'Angelo has unblemished careers as a broker/dealer, management consultant, college professor, Doctor of Dental Surgery, and Hospital Administrator. A look at D'Angelo's performances in these careers show

that he has never been involved in any situations which would show his lack of ability or desire to be able to handle the fiduciary nature of an Investment Advisory relationship.

Even if a reasonable relationship between the consent injunction and the qualifications of D'Angelo can be shown, the consent itself is invalid because D'Angelo neither read nor understood the meaning of his consent. D'Angelo swears that if he properly understood the meaning and consequences of his consent, he never would have signed the order without a full trial. The SEC has offered no proof, except his actual signature, that D'Angelo understood the injunction and knowingly and intelligently consented to it. Such a consent, since it carries with it such drastic consequences, should be valid only if D'Angelo knew what he was doing and he made his choice with open eyes. The mere fact D'Angelo had a right not to consent should not end the SEC responsibility to insure he knew what he was signing. D'Angelo argues that a valid consent must be made with an apprehension of nature of the injunction, the statutory violations included therein, the range of allowable punishments and future consequences thereunder, the possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A search of the record shows that the SEC did not take any steps to insure that D'Angelo was aware of any of these requirements of a valid consent. Therefore, if the consent is not valid, it cannot serve as a justifiable basis for exclusion of D'Angelo from associating with an Investment Advisor.

SUMMARY OF POINT II

The exclusion of D'Angelo from associating with an Investment Advisor based on the 1970 consent injunction can be justified only if it is in the public interest. D'Angelo argues that this sanction is not in the public interest because it is not reasonably related to the purpose of the Advisors Act. The sanction is not reasonably related to the purpose of the Advisors Act because it is based on the consent injunction which is irrelevant to the qualifications and trustworthiness of D'Angelo. The circumstances surrounding the consent injunction render it meaningless as to the qualifications or trustworthiness of D'Angelo.

Exclusion based on the existence of a consent injunction is an impermissible conclusive presumption which precludes proof on the injunction's actual relevancy to the qualifications and trustworthiness of D'Angelo. D'Angelo has the right to rebut this presumption and prove the irrelevancy of the injunction on his qualifications. Moreover, D'Angelo's many years of quality service to his community is further proof of his ability to function in a fiduciary relationship.

Even if the consent injunction has some bearing on D'Angelo's qualifications to associate with an Investment Advisor it is invalid because D'Angelo did not knowingly or intelligently consent to its imposition. Therefore, the existence 1970 consent injunction does not justify the exclusion of D'Angelo from associating with an Investment Advisor.

ARGUMENT

Point III

THE ORDER OF THE SECURITIES AND EXCHANGE COMMISSION
MUST BE SET ASIDE BECAUSE THE PENALTY IS MORE SEVERE
THAN THAT PERMITTED BY STATUE.

Section 203(f) of the Investment Act of the Securities Exchange Act at the time of the decision of December 16, 1976 provided:

"The Commission may, by order, shall censure or place limitations on the activities of any person associated or seeking to become associated with an Investment Advisor, or suspend for a period not exceeding 12 months."

The SEC apparently believe that this Section gives the SEC the power to bar a person for the rest of his life. This severe sanction by the SEC is without doubt an abuse of discretion and is of an arbitrary and capricious nature. The attempts of the SEC to prevent D'Angelo for all time from being permitted to ever associating with an Investment Advisor is not only unduly harsh but criminal in light of the nature of his so called violation.

To deny Daycon its registration as an Investment Advisor and from ever having D'Angelo associate with its Investment activities is without doubt the most frightening abuse of discretion by the SEC. Daycon is owned by D'Angelo and his children. To bar D'Angelo from ever associating with Daycon in the role as an Investment Advisor and to deny Daycon from receiving its registration as an Investment Advisor is in reality severely sanctioning the D'Angelo children. Two of the D'Angelo

children intended to actively work in the Investment Advisor field and have now been unduly punished and prevented from pursuing a field of endeavor they have been preparing for during their College education.

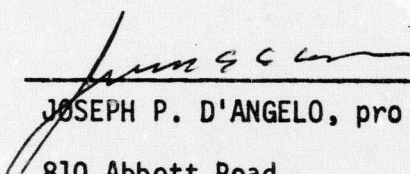
A bar for life would be entirely punitive and is not permitted by the Constitution. Cummings v. Missouri 71 U.S. (4 Wall) 277, 320-322 (1866); Exparte Garland 71 U.S. (4 Wall) 333, 380-381 (1866) and United States v. Lovett 328 U.S. 303, 314 (1946).

CONCLUSION

WHEREFORE, for all of the reasons set forth above the Petitioners, Daycon and D'Angelo pray that the Court will reverse the denial of Daycon's Application for Registration as an Investment Advisor and remove the bar against D'Angelo so he may associate with an Investment Advisor.

Respectfully submitted,

Dated: Buffalo, New York
March 16, 1977



JOSEPH P. D'ANGELO, pro se

810 Abbott Road
Buffalo, New York 14220

(716) 825-5020

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH P. D'ANGELO
DAYCON INVESTORS ASSOCIATES, INC.

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

DOCKET NO. 77-4006-7

AFFIDAVIT OF SERVICE

STATE of NEW YORK }
CITY of BUFFALO }

ss:

The undersigned, being duly sworn, deposes and says that on Wednesday, March 16, 1977, she called to be served by United States mail, postage pre-paid two copies of the BRIEFS, one copy of the APPENDIX and one copy of the EXHIBITS, upon that person whose name and address is hereafter set forth:

Alan Rosenblat
Assistant General Counsel
Securities and Exchange Commission
Washington, D.C. 20549

Nancy Koukal
Nancy Koukal

2618 Parker Boulevard
Tonawanda, New York 14150

Sworn to and subscribed before
me this 16th day of March, 1977.

Joseph P. D'Angelo
Notary Public

JOSEPH P. D'ANGELO, JR.
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978

78